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No. 266.

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BRIEF OF DEFENDANT IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1901.

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E. M. CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

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THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

The only question involved is, "Does the license tax imposed in the ordinance interfere with or impose a burden upon inter-state commerce, and is said ordinance unconstitutional as being in conflict with Article I, Section 8 of the Constitution of the United States?

The two offences denounced by the ordinances are: 1st. The business of selling pictures, etc. 2nd. The business of delivering pictures, etc., and no discrimination is made in favor of the residents of the City of Greensboro or of the State of North Carolina.

In the State Supreme Court the defendant's counsel lays down the proposition that no state has the right to levy a tax on inter-state commerce in any form, and cites in support thereof the following cases:

Lyng vs. Michigan, 135 U. S., 165.
Leloup vs. Port of Mobile, 127 U. S., 640.
Gibbons vs. Ogden, 9 Wheaton, 1–222.
State Freight Tax Cases, 15 Wallace, 232–279.
Robbins vs. Shelby Taxing District, 120 U. S., 480.
Brennan vs. Titusville, 153 U. S., 289–303.
Stoutenburg vs. Hennick, 129 U. S., 141–148.

Asher vs. Texas, 128 U. S., 129.
Freight Discrimination Cases, 95 N. C., 428–434.
State vs. French, 109 N. C., 722.
Adkins vs. City of Richmond, 47 L. R. A., 583.

That this is true is freely admitted. The case at bar, however, can be easily distinguished from every case cited.

Here the pictures and frames are shipped in large packages to the Chicago Portrait Company, and not to the purchasers. The packages are delivered to the defendant at his hotel in Greensboro, and the original packages broken, and the manufacture of the articles completed by putting the pictures into the frames and tacking the backs on. The defendant then delivers the pictures and frames, one at a time, to the purchasers, and until received by those contracting to purchase, the title to the said articles remained in the Chicago Portrait Company. The contract was executory. The sale was only completed when the pictures and frames were delivered and accepted. Tiedman on Sales, Sections 88 and 89. The carrier was the agent of the shipper and not of those contracting to purchase.

Lyng vs. Michigan, 135 U. S., 165,

is a case in which the beer was sold in the original package; as also is

Leisy vs. Hardin, 135 U. S., 100,

relied on by defendant.

Leloup vs. Port of Mobile, 127 U. S., 640,

holds that a State or municipality cannot impose licence tax on telegraph company doing an inter-state business.

Gibbons vs. Ogden, 9 Wheaton, 1–222,

holds that an act of the Legislature of New York, granting to Robert R. Livingston and Robert Fulton the exclusive right of navigation by steamboats of all waters within the jurisdiction of that State, is inoperative so far as it prohibits vessels licensed by the United States doing a coasting trade by means of steamboats.

State Freight Tax Cases, 15 Wallace, 232–279,

decides that a statute of Pennsylvania imposing a tax upon freight taken up within the State and carried out of it, or taken up with-

out the State and brought within it, is repugnant to the Constitution of the United States.

Robbins vs. Shelby Taxing District, 120 U. S., 480,

holds that a state cannot tax a drummer of a non-resident soliciting orders.

Brennan vs. Titusville, 153 U. S., 289–303,

is a case in which the pictures and picture frames were shipped to those contracting to purchase, and not to the manufacturers themselves, as in the case at bar.

Stoutenburg vs. Hennick, 129 U. S., 141–148,

holds that a drummer of a Baltimore house cannot be required to pay a license tax in the District of Columbia.

Asher vs. Texas, 128 U. S., 129,

decides that a drummer of a Louisiana house cannot be required to pay a license tax in Texas.

Freight Discrimination Cases, 95 N. C., 428,

holds that the Legislature of North Carolina cannot regulate charges made by railroads for transporsation of freight from one state to another.

State vs. French, 109 N. C., 722,

holds that the North Carolina purchase tax is not repugnant to the United States Constitution.

Adkins vs. City of Richmond, 47 L. R. A., 583,

holds that a broker for a non-resident, that is, a local drummer, is not liable for a license tax, where the orders are sent to the non-resident and the goods shipped to the purchaser.

In the case at bar the goods belong to and are in the possession of the Chicago Portrait Company, after arrival at Greensboro, within the State of North Carolina; they are taken to a temporary warehouse, to-wit: the room of the plaintiff in error, and the manufacture completed, and thus the goods become mixed with the

general mass of property of the State by the action of the Portrait Company.

Machine Company vs. Gage, 100 U. S., 678.
Ewert vs. Missouri, 156 U. S., 296.
Range Company vs. Carver, 118 N. C., 328.

The Company did not elect to ship the pictures and frames to those contracting to purchase, as it might have done, and as was done in the case of

Brennen vs. Titusville supra.

"As soon as the goods are in the State, and become part of its general mass of property they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of

Brown vs. Houston, 114 U. S. 622.

"When goods are sent from one State to another for sale or in consequence of a sale they become part of its general property and amenable to its laws, provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are."

Brown vs. Houston, supra.
Machine Company vs. Gage, 100 U. S. 676.

"But to tax the sale of such goods, or the offer to sell them before they are brought into the State is a very different thing and seems to us clearly a tax on Inter-State commerce itself."

Robbins vs. Shelby, Taxing District, supra.

The ordinance complained of here does not discriminate against goods from another State and does not attempt to prevent the "offering for sale" goods from another State. The plaintiff in error was convicted of the offence of "engaging in the business of delivering pictures" without a license.

"And it was laid down by the great Magistrate which presided over this court for more than a third of a century that the point of time when the prohibition ceases and the power of the State to tax commerce is not the instant when the article enters the country *but when the importer has so acted upon it* that it has become incorporated and mixed up with the mass of property in the country *which happens when the original packages is no longer such in his*

hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property and a tax which finds the article already incorporated with that mass by the act of the importer, etc." [Italics ours.]

Leisy vs. Hardin, supra.

"The rule deducible from the authorities seems to be that if the dealings or transactions are between parties in different States, or the transportation of freight or passengers from one State to another, a tax by a State law is prohibited, irrespective of whether there is discrimination or not, but when the tax is on an occupation carried on in the State or on property therein, the State has power to levy the tax, unless it discriminates against the articles brought from other States, with the sole exception that the sale of such articles in the original package cannot be taxed by the State. Even this exception which is laid down in Leisy vs. Hardin, 135 U. S. 100, is strongly controverted by the able dissenting opinions of Justices Gray, Harlan and Brewer in that case."

State vs. French, 109 N. C., 722.

The business of the plaintiff in error was that of completing the manufacture of the pictures as delivered, delivering the framed pictures when so finished and receiving the money from the purchasers. He found the goods in Greensboro, the property of his employer. He had nothing to do with taking the orders. It was entirely a North Carolina business.

A. M. SCALES,

Atty for City of Greensboro.